Supreme Court, U.S.
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No. 96-797

In The

Supreme Court of the United States

October Term, 1996

JOSEPH ALLEN HEARD,

Petitioner,

v.

MARY BETH CALL and HEATHER CALL, a Minor, by and through her Next Friend, MARY BETH CALL,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Do Missouri's procedures for awarding and reviewing the award of punitive damages in a triple-homicide wrongful death case adequately protect the due process rights of defendants against whom punitive damages are assessed pursuant to state statute?

2. Should a defendant who commits a vehicular triple homicide and injures two others while intoxicated have a right to expect he will be free from statutorily-permitted punitive damages that mirror the reprehensibility of his conduct?

3. Does an incarcerated defendant have a due process right to be present in a distant civil courtroom when he and his attorneys fail to take advantage of a myriad of alternative methods of insuring his meaningful participation in the proceedings?

4. Should certiorari be available to a litigant when his complaints are the product of his own actions and those of his insurer and counsel and, as a result, resolution of the preceding questions would not alter the outcome of the lower court proceedings?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondents Mary Beth and Heather Call respectfully request this Court deny the petition for writ of certiorari which seeks review of the opinion of the Missouri Supreme Court found at 925 S.W.2d 840 (Mo. banc 1996).

RESTATEMENT OF THE CASE

Petitioner's statement of the case bears little resemblance to the actual course of events in the circuit and appellate courts of Missouri following the vehicular deaths of Richard Call, Daniel Call and Beth Call and the serious physical and emotional injuries inflicted on respondents Mary Beth and Heather Call by the petitioner. This same infirmity was evident in the state Supreme Court and reflected in its opinion but apparently has gone uncured. An account, consistent with the actual record, follows.

Respondents filed a multi-count petition for personal injury and wrongful death on June 23, 1994, after petitioner, a drunken 19-year-old with an altered driver's license, crossed the centerline on a rural Missouri highway and killed a father and two children, leaving the mother and surviving daughter with serious physical and emotional injuries. The petition sought both compensatory and punitive damages, the latter triggered by "aggravating circumstances" under Missouri's wrongful death statute in that petitioner's actions while driving drunk were willful and wanton and in conscious disregard for the safety of others.

Petitioner's insurance company hired a law firm in St. Louis, Missouri, some 140 miles away, to defend him. Petitioner's lawyers filed an answer on his behalf, but on the same day and in the same proceeding filed a separate petition on behalf of the insurance company asking that it be relieved of any further duty to defend him. (These two cases were later severed for trial but counsel maintained the dual representation of insurer and insured until appeal in late 1995 despite the clear conflict of interests.)

As part of respondent's discovery, petitioner and his attorneys were served with a timely notice of deposition at petitioner's place of incarceration in Boonville, Missouri. His counsel made no attempt to quash the deposition notice and did not attend, but later succeeded in quashing the deposition pursuant to a special court rule not applicable here. Regardless however, they made no effort to preserve their client's testimony for trial, either by deposition transcript or videotape. They also failed to answer interrogatories propounded to petitioner, leading to an order of default against petitioner which the court later withdrew, allowing the case to continue. On April 17, 1995 the court set the matter for trial to begin July 18, 1995. All parties waived a trial by jury.

Not until a week before trial did petitioner attempt to obtain a writ that would allow him to attend the trial in person. Upon receipt of the application for the writ of habeas corpus, respondent's counsel told petitioner's attorneys that Missouri law prevented the state Department of Corrections from producing an inmate at a civil trial, except in limited circumstances unrelated to this matter. At the time of trial the statute provided that "No

person detained in a correctional facility of the department of corrections shall appear and attend or be caused to appear and attend any civil proceeding, regardless of whether he is a party, except in those instances in which the offender is a respondent in a chapter 211 proceeding to terminate parental rights." Section 491.230.2 RSMo (1994). The trial court, aware of the statutory limitations placed on the Department of Corrections by § 491.230.2, issued the writ anyway. The Department of Corrections then declined to obey the writ, citing the statute.

Petitioner made no attempt to enforce the writ, to move the trial to petitioner's place of incarceration, or to testify by an eleventh-hour deposition. Not until the morning of trial did petitioner's lawyers move for a continuance in order to take his deposition. The motion, untimely under Missouri law, was denied.

At trial, petitioner put on no evidence save for a brief recitation of so-called "admissions" from the deposition of Mary Beth Call. His only defense consisted of arguments that the carnage he caused could have been avoided had only Richard Call gotten out of his way. Nor did petitioner proffer any evidence in mitigation of any punitive damage award, his burden under Missouri law. Nor did his attorneys seek to invoke any relief accorded to him by state civil procedures for court-tried cases, such as keeping the record open for inclusion of additional evidence. The court entered judgment in favor of respondents and awarded equal amounts of compensatory and punitive damages.

On direct appeal to the Supreme Court of Missouri under its exclusive jurisdiction to decide the constitutionality of a state statute, petitioner argued *inter alia* he was unconstitutionally denied access to the courts and that punitive damages in court-tried cases are unconstitutional. The Missouri high court rejected those arguments and affirmed a slightly altered judgment in favor of respondents, one judge noting that petitioner's attorneys "virtually abandoned him" during the entire pendency of this case. This petition for writ of certiorari followed.

REASONS TO DENY THE WRIT

Reserved for securing review of some compelling issue, a writ should not issue from this Court to save lawyers and insurance companies from the consequences of, as the Missouri Supreme Court said, abandoning an insured. One can only speculate the effect on the verdict had the insurance company expended as much effort defending the insured through trial as it has on appeal trying to negate that judgment and avoid the obligation for its satisfaction. The real motivation for this petition, then, is to preempt attempts to satisfy that judgment.

Advancing that goal, counsel voices due process concerns of insufficient notice of the potentiality of punitive damages, insufficient standards for setting and reviewing punitive damage awards and the statutory limitations on an inmate's right to be present at a civil trial in which he is a party.

Devoid of legal merit, these ostensible reasons should also be rejected because they would not affect the

judgment in that they are the product of petitioner's own making, particularly the errors and omissions of those purporting to act on his behalf.

Regardless, the judgment against petitioner satisfies the dictates of *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589 (1996), and its precursors in this Court by balancing reasonableness, ratio and reprehensibility. The Supreme Court of Missouri applied the required standards of review and, because any perceived slight in the denial of petitioner's "presence" at trial was entirely the fault of petitioner's own attorneys, this Court should deny the petition for a writ.

MISSOURI'S PROCEDURES FOR REVIEWING PUNITIVE DAMAGE AWARDS IN COURT-TRIED CASES ARE CONSTITUTIONALLY SOUND, AS THEY PROVIDE DETAILED REVIEW OF STANDARDS AND SAFEGUARD A DEFENDANT'S DUE PROCESS RIGHTS

The trial court was cited to and guided by Missouri's pattern instructions which call for punitive damages to be awarded if defendant's conduct "showed complete indifference to or conscious disregard for the safety of others" and in such a sum as the trier of fact believes "will serve to punish defendant and to deter defendant and others from like conduct." This is the first step in the "traditional common law approach" to punitive damages, an approach which satisfies due process. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991). The remainder of the due process requirements under *Haslip*, such as a record of the grounds for a punitive damage award, were also satisfied in that the trial court's judgment specifically

listed 11 separate acts of the petitioner that would individually, or in combination, support the award.

Petitioner next took the issue to the state Supreme Court, where factors such as the degree of malice or outrageousness of defendant's conduct, aggravating circumstances, and the age and character of the injured parties were again considered with attendant extensive briefing and argument, thereby satisfying the *Haslip* "due process concerns expressed by the [U.S.] Supreme Court." *Call v. Heard*, 925 S.W.2d 840, 849-50 (Mo. banc 1996). The punitive damage award was supported by evidence that petitioner "showed complete indifference to or a conscious disregard for the safety" of the Call family, that he was reckless, drunk and driving erratically. *Id.* at 852. Petitioner now claims the punitive damage award was unconstitutionally "excessive." This is a claim he never raised before this petition for writ of certiorari. *Id.* at 850.

While petitioner is unhappy with the judgment against him, his recourse is against others and not respondents for any deprivation of his rights. Since the opinion of the Supreme Court of Missouri does not conflict with any decision of this Court, no compelling reason exists for the issuance of a writ of certiorari.

NO CONSTITUTIONAL REQUIREMENT FORCES A PLAINTIFF TO PRESENT EVIDENCE OF MITIGATING FACTORS OR OF A DEFENDANT'S FINANCIAL WORTH TO SUPPORT PUNITIVE DAMAGES, AND THE BURDEN OF PRODUCING EVIDENCE OF PENURY OR ANY OTHER MITIGATING FACTOR IS BORNE BY THE DEFENDANT UNDER MISSOURI LAW.

Petitioner also complains that the trial court failed to consider any mitigating factors that might have reduced or eliminated the award of punitive damages despite offering virtually no evidence save for some "admissions" read from the deposition of Mary Beth Call. Petitioner's mother was in the courtroom during trial and could have been called as a witness. Petitioner could have appeared by deposition transcript or videotape. Character witnesses could have been called or affidavits offered. He chose to do none of those things.

Now claiming penury as a mitigating factor, petitioner offered no such evidence. Evidence of net worth is not a prerequisite to punitive damages. *Elam v. Alcolac*, 765 S.W.2d 42 (Mo.App. W.D. 1988). Petitioner has the burden of injecting and offering evidence in mitigation, including financial status, but failed to do so.

One excuse offered for the first time here is lack of notice that punitive damages could be awarded in wrongful death actions. Indeed, on the morning of trial, petitioner's counsel argued to the court that punitive damages were not allowed under Missouri's wrongful death statute, apparently unaware of the decision of Missouri's high court in *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo. banc 1995), handed down

three months before trial, in which aggravating circumstance damages were specifically held to be punitive in nature, requiring a separate verdict. Until then, while still considered "punitive in nature," such damages had been lumped together with other damages delineated in the statute.

That this change did not occur until early 1995 confirms yet another misleading statement of petitioner, here at page 19: "Research discloses that the highest punitive damage award reviewed and affirmed by a Missouri appellate court is $500,000.00." First, that isn't true. *See, e.g., Elam*, 765 S.W.2d 42 (Mo.App. W.D. 1988), holding the trial court should not have overturned a punitive damage award of $43 million dollars in a toxic tort suit. Secondly, pre-*Bennett*, Missouri's courts have affirmed million-dollar awards that considered aggravating circumstances as part of a single damage award. *See, e.g., Morrissey v. Welsh Co.*, holding an award of $6.5 million dollars under Missouri's wrongful death statute was not so large as to be deemed excessive, and *Blum v. Airport Terminal Services, Inc.*, 762 S.W.2d 67 (Mo.App. E.D. 1988), holding that a one million dollar award to parents of a co-pilot in airplane crash was not excessive.

Nevertheless, petitioner seizes upon the lack of mitigation evidence at trial, ignoring the aggravating factors presented to the trial court. He claims this case should be governed by the language of *BMW*, but overlooks some of this Court's most telling language in that opinion, that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. As the Court stated nearly

150 years ago, exemplary damages imposed on a defendant should reflect 'the enormity of his offense.' " *BMW*, 116 S.Ct. at 1599, citing *Day v. Woodworth*, 13 How. 363, 371 (1852). Unlike the tortfeasor in *BMW*, this petitioner did not fail to disclose a bad paint job that in many states would not even be actionable. His tort was the wrongful death of a father and two children coupled with the infliction of serious physical and emotional trauma on the two surviving members of the family. Unlike here, BMW challenged the size of the award throughout state court proceedings and did not raise it for the first time before this Court.

A PRISONER HAS NO RECOGNIZED DUE PROCESS RIGHT TO BE PRESENT PHYSICALLY AT A CIVIL TRIAL

Petitioner failed to take advantage of the panoply of alternatives to his physical presence in court that are afforded to him under Missouri law, and now tries to shift the blame to a supposed constitutional infirmity of § 491.230.2 RSMo (1994). He could have had a meaningful presence in court by presenting his deposition testimony. He did not. As petitioner now seems so concerned with his facial expressions, he could have presented a videotaped deposition. He did not. He could have presented a more meaningful defense than the one used at trial, which was to blame the deceased for failing to get out of his way. He did not. He could have requested that the record of the bench trial remain open for additional evidence, including his deposition. He did not.

A prisoner is not entitled to perfect access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821-23 (1977); *Price*

v. Johnston, 334 U.S. 266, 285-86 (1948). He is entitled to meaningful access, which is generally satisfied by the appearance of counsel, *see, e.g., Stone v. Morris*, 546 F.2d 730, 735 (7th Cir. 1976), or by the presentation of deposition testimony. *See, e.g., Throndset v. Hawkenson*, 532 N.W.2d 394, 397 (N.Dak. 1995). While petitioner may be able to argue in another forum that he was denied meaningful access by his own counsel, that argument is not for this Court at this time.

The state's interest in economy, safety and continued incarceration of its prisoners sufficiently shows a rational relationship between the statute and a legitimate state interest. *State v. Williams*, 729 S.W.2d 197 (Mo. banc 1987).

CONCLUSION

For the foregoing reasons, all of which show there is no compelling issue presented in petitioner's request, the petition for writ of certiorari should be denied.

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